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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	

COMMENTS OF THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE, THE CALIFORNIA BANKERS CLEARING HOUSE ASSOCIATION, THE NEW YORK CLEARING HOUSE ASSOCIATION, ABB BUSINESS SERVICES, INC., AND THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

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Dated: April 25, 1996

SUMMARY

Over more than a decade, the Commission has consistently found that the continued application of the tariff-filing requirement to interexchange services does not foster competition and may, in fact, undermine that goal in several important respects. Nothing in recent history contradicts those findings, especially with respect to customer-specific service arrangements (including those that contain both domestic and international calling capabilities). The Commission has repeatedly sought a lawful means to de-tariff the services of non-dominant carriers and, in the Telecommunications Act of 1996, Congress has handed the Commission the statutory tool needed to do the job.

In addition to the general benefits of de-tariffing identified by the Commission in the past, de-tariffing will produce an immediate and important benefit to customers of individually negotiated service arrangements -- parity with the carriers in terms of the enforceability of their service contracts. Non-dominant carriers have been effectively free from regulatory oversight, yet the law has granted them assurances that whatever clauses they put in tariffs will "trump" their contracts even if users are not told of (and do not consent to) the new provisions. Under these circumstances, non-dominant carriers have become increasingly insistent on including one-sided terms in their tariffs. Only mandatory de-tariffing -- and the resulting elimination of the filed rate doctrine -- will put a well-deserved end to this practice.

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The Ad Hoc Telecommunications Users Committee, the California Bankers Clearing House Association, the New York Clearing House Association, ABB Business Services, Inc. and The Prudential Insurance Company of America file these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding released March 25, 1996.

The undersigned are large users of interstate interexchange telecommunications services and associations of such users. The group, which includes customers of all of the major interexchange carriers, encourages the Commission to require interexchange carriers to withdraw their tariffs for customer-specific service arrangements. The continued application of the tariff-filing requirement to such arrangements does not serve the Commission's interest in fostering competition in the interstate interexchange marketplace and may, in effect, undermine that goal in several important respects.

I. The Continued Application of the Tariff-Filing Requirement to Customer-Specific Service Arrangements Would Not Serve the Commission's Long-Standing Policy Goals.

More than a decade ago, the Commission found that permitting non-dominant carriers to offer interexchange services on a non-tariffed basis would further the primary goal of the regulatory scheme set forth in the Communications Act of 1934, *i.e.*, "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151. In particular, the Commission found that "there was no evidence" that tariff filings were necessary to prevent non-dominant common carriers from charging unjust and unreasonable rates or unlawfully refusing to make their services available.[1] As the Commission later explained, the core requirements of Title II of the Act -- just and reasonable rates -- "could

[1] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fourth Report and Order, 95 FCC 2d 554, 578 (1983), *vacated*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied sub nom. MCI Telecommunications Corp. v. AT&T*, 113 S. Ct. 3020 (1993) ("*Competitive Carrier*"). *See also Competitive Carrier*, First Report and Order, 85 FCC 2d 1, 31 (1980) ("[F]irms lacking market power simply cannot rationally price their services in ways which, or impose terms and conditions which, contravene Sections 201(b) and 202(a) of the Act.")

be effectuated for certain carriers . . . through market forces and the administration of the complaint process."[2]

The Commission has tentatively reiterated this determination in the instant NPRM, noting that "we still believe that non-dominant carriers lacking market power cannot rationally price services anticompetitively." NPRM, ¶ 37. We can identify no reason why changed market conditions -- the transformation of AT&T, the only dominant interexchange carrier at the time of the *Competitive Carrier* proceeding, into a non-dominant carrier -- should compel a re-evaluation of this conclusion.[3]

The Commission has also long recognized that tariff filing by non-dominant carriers can, in fact, frustrate achievement of the policy goals entrusted to the agency by Congress. It has consistently found that the tariff-filing requirement undermines the development of vigorous competition by stifling service and marketing innovations and facilitating price coordination among competing carriers. *See* NPRM, ¶¶ 29-30.[4]

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2 *Competitive Carrier*, Sixth Report and Order, 99 FCC 2d 1020, 1029, n.33 (1985), *vacated*, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

3 Indeed, the evolution of the market should make the former dominant carrier more responsive to competitive pressures and, like the other carriers, less prone to price in an unlawful manner. Developments in the realm of customer-specific service arrangements for large users have borne this out. It has become increasingly apparent in recent years that a critical factor for AT&T in pricing its business services for large users and agreeing to service guarantees and other terms and conditions is whether there is a realistic possibility that the customer will give some (or all) of its business to one of AT&T's competitors. The willingness of large users to do just that means that AT&T cannot insist upon unjust or unreasonable rates or other terms and conditions for such users.

4 *See Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd 8072, 8079 & n.111, 8080 n.118 (1992).

The Commission has not wavered in these views in the intervening years and has consistently sought a lawful means to implement that policy. In the Telecommunications Act of 1996, Congress has handed the Commission the statutory tool needed to do the job.[5]

II. De-Tariffing Customer-Specific Service Arrangements Will Encourage Fair Dealing and Foster Competition.

The withdrawal of carrier tariffs for interstate interexchange services will not only remove an unnecessary burden on the carriers but will also produce affirmative benefits for customers. In addition to the general benefits previously identified by the Commission and noted above, de-tariffing is likely to produce an immediate and important benefit to customers of individually negotiated service arrangements -- parity with the carriers in terms of the enforceability of their service contracts. Because the carriers are unlikely to bestow these benefits voluntarily, any de-tariffing policy adopted by the Commission should be mandatory. *not permissive*.

The most immediate benefit of de-tariffing for customers taking service under customer-specific arrangements is that they will be able to enforce the contracts they have negotiated with the carriers. Under the current regulatory regime, non-dominant carriers are effectively free to abrogate

[5] Section 401 of the Telecommunications Act of 1996, which adds a new Section 10(a) to the Communications Act, requires the Commission to forbear from applying regulatory or statutory requirements to carriers or particular services if the Commission determines that (1) their enforcement is not necessary to ensure compliance with the Act's core requirements, (2) enforcement is not necessary to protect consumers, and (3) forbearance is consistent with the public interest.

long-term contracts by filing changes to the applicable tariffs without specifically informing their customers, and on abbreviated or non-existent general public notice of any kind.[6] The filed rate doctrine acts as a shield for such behavior, and this Commission has hesitated to declare that the standards of commercial law will be applied with full force in these circumstances.[7]

All of the major interexchange carriers have devised vehicles for their customer-specific service arrangements that rely upon this regime to the disadvantage of their customers. AT&T's Contract Tariffs ("CTs"), MCI's Special Customer Arrangements ("SCAs"), and Sprint's Custom Network Service Arrangements ("CNSAs") all contain negotiated, customer-specific terms but rely for most provisions upon the carriers' generic tariffs -- which undergo frequent amendment.[8] In our experience, the carriers jealously guard their right to amend those generic tariffs without first securing the consent of (or even giving notice to) their CT, SCA or CNSA customers who may be affected by the changes.[9]

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6 Even large users do not maintain watch over the Commission's public reference log of tariff filings, and (other than AT&T in connection with its Tariff 12), the carriers flatly refuse to advise even their largest customers of changes to their tariffs in advance of filing. Without constant vigilance, 14-day public notice periods are easily missed; a one-day notice period does not afford even a theoretical opportunity for protest.

7 *See Competition in the Interstate Interexchange Marketplace*, *on recon.*, 10 FCC Rcd 4562, 4574 (1995) (denying request to incorporate principles of commercial law into the "substantial cause" test for carrier modification of long-term service arrangements).

8 The Commission's Tariff Transmittal Public Reference Logs for March 1996 contain over 100 transmittals amending AT&T, MCI or Sprint generic tariffs, *i.e.*, those that are not customer-specific but that are incorporated by reference into CTs, SCAs and CNSAs.

9 Indeed, the carriers routinely deny customers prior approval rights even with respect to the customer-specific portions of their tariffs. The exception to this practice is AT&T's Tariff 12, in which the carrier "waives the right" to raise the rates or make adverse tariff revisions without customer consent. AT&T Tariff F.C.C. No. 12, Sections 7.2.9.H and 7.2.9.I.

When the filed rate doctrine is applied to this widespread (and plainly unreasonable) practice, the result is that one party can unilaterally change any contractual term it finds inconvenient or disadvantageous.

The concerns expressed here are not at all hypothetical.

AT&T's Contract Tariffs. In August 1993, AT&T filed CT No. 383 for an individual customer. In September 1993, two weeks after receiving an order from a second customer for that CT, AT&T filed an amendment to significantly limit the application of certain usage credits in the tariff. Two additional customers submitted orders prior to the proposed effective date of those tariff modifications. The new customers asked the Common Carrier Bureau to reject the proposed tariff amendment, citing AT&T's failure to seek their approval before making material adverse changes to the CT. The new customers withdrew their petitions only after AT&T agreed to permit them to take service under the CT as it had existed at the time their orders were placed.[10] The Commission has released a Notice of Apparent Liability against AT&T for apparent violation of Section 201(a) of the Act by failing to provide service to these three prospective customers, all of whom are resellers of AT&T services. The Commission cited AT&T's "attempt[ed] . . . use [of] the tariff process to alter material terms of the service to the detriment of resellers after AT&T had

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[10] These events are recounted in *AT&T Communications, Apparent Liability for Forfeiture & Order to Show Cause, Notice of Apparent Liability for Forfeiture & Order to Show Cause*, FCC No. 94-359, ¶¶ 4-8 (released Jan. 4, 1995).

received service orders" as evidence that the carrier "has apparently sought to evade the Commission's resale policy."[11]

MCI's SCAs: In 1995, MCI tariffed a provision that automatically renews certain multi-year service arrangements unless the customer "provides written notification to cancel the [plan], which must be received by MCI not less than 30 days prior to the expiration of the term."[12] Customers who negotiated SCAs with MCI that neither state nor imply that notice must be given of the buyer's intent *not* to renew may now face substantial penalties if they want to exercise their bargained-for right to change carriers at the end of the three-year service term.[13]

At about the same time, MCI also added rules for arbitrating payment disputes that require customers, as a condition of taking service, to waive important legal rights, including their statutory right to a Commission or court determination of the validity of MCI's charges.[14] In a more recent filing,

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11 *Id.* at ¶ 13.

12 MCI Telecommunications Corp., Tariff F.C.C. No. 1, Section C.3.18372.

13 MCI has also undertaken tariff changes that deprive customers of bargained-for rights to terminate prior to the expiration of the service term. In March 1994, without securing the consent of all affected customers, MCI increased customer liability for terminating a Vision VIP Plus term plan. Prior to that date, the customer was liable for any commitment applicable to the year in which the termination occurred, plus an amount equal to 35% of the commitments for the remaining years of the term; the amendment added that the customer would also be required to repay any promotional credits previously given. *See* MCI Telecommunications Corp., Tariff F.C.C. No. 1, Section C.183752.

14 The provision allows MCI to compel arbitration of disputes in excess of $10,000, and forbids the arbitrator from awarding "any interlocutory relief, including temporary or preliminary injunctions," "penalties other than those provided in any applicable publicly filed tariff," or "attorneys fees." MCI Telecommunications Corp., Tariff F.C.C. No. 1, Section B.7.13812. This makes it impossible for a customer to prevent a cutoff of service while the arbitration proceeds and deprives the customer of rights guaranteed by the Communications Act. The tariff also states that the arbitrator must apply the relevant terms of MCI's tariff and "has no authority under

MCI has modified its tariff provisions relating to toll fraud so as to make its SCA and other customers strictly liable for all unauthorized use occurring after either the customer notifies MCI or MCI notifies the customer of suspected fraud.[15] This shift of all liability to the customer would constitute an abrogation of any commitment previously made by the carrier to carry out customer-requested blocking of country codes or specified trunks to minimize fraud.

Sprint's CNSAs: In March 1995, Sprint filed its Tariff 12 for CNSAs that had been negotiated prior to that date. The tariff contains terms that were undoubtedly at odds with existing contracts. For example, the tariff states that the negotiated rates, terms and conditions apply only at service sites that are owned or leased to entities in which the customer owns at least a 20% equity share or that is a franchisee of the customer.[16] By prohibiting a customer from taking service under a CNSA for the benefit of affiliates that are not 20%-owned or on behalf of unaffiliated entities, this tariff undoubtedly contradicts provisions negotiated by one or more Sprint customers -- and also appears to violate the Commission's resale and shared use policy. Another provision of the tariff permits Sprint to terminate service and impose a penalty on the customer in the event that the customer "ceases to use a material amount of Network Services at

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any circumstances to deviate from or abrogate" the terms of that tariff -- regardless of how unjust or unreasonable or unreasonably discriminatory they might be. MCI Telecommunications Corp., Tariff F.C.C. No. 1, Section B.7.13811.

15 MCI Telecommunications Corp., Tariff F.C.C. No. 1, Section B.4.102.

16 Sprint Communications Company, Tariff F.C.C. No. 12, Section 2.1.

any time during the term".[17] It is unlikely that all of Sprint's large customers granted such rights in their negotiated service arrangements.

Other carriers: These practices may not be limited to the "big three" interexchange carriers. In 1996, LDDS/WorldCom tariffed a service guarantee that, according to the filing, "will automatically compensate the customer when stated product performance levels are not met."[18] If, as we understand, these guarantees had been offered to customers on an individual basis prior to their inclusion in the carrier's general tariff, all customers would have had to consent to the limitation contained in the tariff, which permits the carrier to "discontinue" providing the service in the event that the carrier is required to provide five or more restoration credits in a 30-day period.[19]

AT&T's Tariff 12 is not immune from this problem: Finally, we note that AT&T's Tariff 12 is far more protective of customer's interests than the offerings described above in this regard. Unlike CTs, SCAs, and CNSAs, AT&T's Tariff 12 is self-contained and includes few references to AT&T's generic offerings. AT&T routinely informs its Tariff 12 customers of changes to the general regulations of Tariff 12 and typically undertakes changes to customer-specific options only with the consent of affected customers. Indeed, the tariff

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17 Sprint Communications Company, Tariff F.C.C. No. 12, Section 2.6.

18 WorldCom, Inc., Tariff F.C.C. No. 2, Section C.3.4.14.3.

19 WorldCom, Inc., Tariff F.C.C. No. 2, Section C.3.4.14.1. The provision entitles the customer to limited reimbursement for the charges relating to reversion to its prior service configuration.

permits a customer to terminate without liability in the event that AT&T should raise the rates or take other adverse action without its consent.[20]

Notwithstanding these provisions, in 1993, AT&T sought to add a new charge for new vertical features associated with inbound service capabilities without securing prior consent of all affected Tariff 12 customers. Particularly brazen was AT&T's attempt to deny customers the right to terminate without liability in circumstances such as this (*i.e.*, AT&T's introduction of a new charge without customer consent) *and* to further deny that right if AT&T should increase the new charge at any time in the future. In response to pressure from the Commission staff acting on a petition by customers who protested the change as an unreasonable carrier practice, AT&T cut the proposed new charge in half and withdrew the anti-termination provision before the transmittal could take effect.[21]

Effectively free from regulatory oversight, yet assured that whatever clauses they put in tariffs will "trump" their contracts even if users are not told of (and do not consent to) the new provisions, non-dominant carriers have become increasingly willing to insert one-sided terms in their tariffs. Only mandatory de-tariffing -- and the resulting elimination of the filed rate doctrine -- will put a well-deserved end to this practice.[22]

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[20] AT&T Tariff F.C.C. No. 12, Sections 7.2.17.A.1 and 7.2.17.A.2.

[21] *Compare* AT&T Communications Revision to Tariff F.C.C. No. 12, Tariff Transmittal No. 5047 (filed April 16, 1993) *with* AT&T Communications Revision to Tariff F.C.C. No. 12, Tariff Transmittal No. 5442 (filed July 14, 1993).

[22] De-tariffing is also likely to deprive the carriers of the common negotiation tactic of insisting upon absurd requirements (or absurd remedies for *de minimus* variations from requirements) on the grounds that the Commission either requires them or that the Commission would look with suspicion on any customer-specific tariff that differed from the others. Typical of

III. De-Tariffing Customer-Specific Service Arrangements Is Not Likely To Constrain Customer Choice.

The elimination of tariffs is unlikely to have an adverse effect on customer choice for large users of telecommunications service, *i.e.*, those customers who buy service under individually negotiated arrangements. Although they would no longer have easy access to information about what other customers may be paying, they can nonetheless test the market by soliciting competitive bids from more than one vendor That should be an acceptable burden for customers whose needs are of sufficient size to warrant negotiating a price. On balance, the Commission's mandatory detariffing proposal will produce more benefit than inconvenience and should be adopted.

IV. The Commission Should De-Tariff International Services Included In Customer-Specific Service Arrangements.

The Commission asks whether it should forbear from requiring non-dominant carriers to continue to file tariffs for the international portions of their integrated service offerings. NPRM, ¶ 33. At least in the case of customer-specific arrangements, the continued application of the tariff-filing requirement would be troublesome and unnecessary. We urge the Commission to forbear for two reasons.

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such provisions are the "monitoring conditions" contained in AT&T CTs. For example, a CT may require that at least 70% of the customer's SDN usage to be interstate. Regardless of whether such a requirement is reasonable, the remedy typically demanded may bear no relationship to the infraction -- if the interstate usage should fall to 69% in any year, the customer may be required to repay all discounts received during that year. *See* AT&T Contract Tariff No. 2174, Section 6.B.1.c.

First, all arrangements under AT&T's Tariff 12, and most CTs, SCAs and CNSAs include some international service, the most common being international direct distance dialing ("IDDD"), international private line, and global frame relay service. If the Commission de-tariffs domestic services on a mandatory basis -- as it should -- but leaves international services subject to the tariff-filing requirement, all of these arrangements would have to be restructured into tariffed and untariffed portions. This would entail substantial expense and inconvenience for both the carriers and their customers and would result, in many cases, in the imposition of separate minimum revenue commitments for domestic and international services where none exist today under many of these arrangements.

Second, the Commission's concerns about the potential "whipsawing" of U.S. carriers by monopoly foreign telephone administrations would be more directly and better addressed by requiring the carriers to file reports regarding their agreements with those entities than by requiring the carriers to file end-user tariffs.

V. The Commission Should Permit Carriers To Bundle CPE With Customer-Specific Service Arrangements For Basic Services, Subject To Certain Safeguards.

The Commission also asks for comment on whether to allow carriers to bundle customer premise equipment ("CPE") and de-tariffed services. NPRM, ¶¶ 84-91. The Commission's question should be answered in the affirmative, subject to at least two safeguards. First, the carriers should be required to use public interfaces for their services and to give adequate public notice of any changes in those interfaces. Second, the carriers should be required to offer on a stand-alone basis any transmission services that they also offer on a bundled basis. Such requirements would strike an appropriate balance between the policy goals of maximizing customer choice and preserving competition in the CPE market.

VI. The Commission Should Mandate A Process To Facilitate The Transition From A Tariffed To A De-Tariffed Environment.

If the Commission decides to require interexchange carriers to withdraw their tariffs for customer-specific offerings, it should mandate a phased process that will allow carriers and customers to re-evaluate their existing contracts to determine what, if any, modifications may be necessary to preserve the expectations of the parties in light of the tariff withdrawals.

For example, CTs, SCAs and CNSAs typically contain prices calculated with reference to rates contained in the carrier's other tariffs. While it is certainly feasible for the parties to take a "snapshot" of those referenced rates prior to the withdrawal of those tariffs and apply the customer-specific discount to that rate for the remainder of the contract term, that approach is likely to frustrate the expectations that one or more of the parties had when it (or they) entered into the contract. Customers typically accept such pricing mechanisms for particular services with the expectation that the referenced tariffed rate will decline in response to carrier cost reductions and/or competitive pressures during the contract term. (Carriers probably assume no such decline, or a minimal one at best.) The carriers and their customers may need to negotiate a replacement pricing mechanism to the extent that a reference to public rates was central to the original contract, *i.e.*, where a party's enjoyment of the benefit of its bargain would be frustrated by the regulatory change.

We suggest that the Commission establish a period of, perhaps, six months during which existing customer-specific tariffs can be withdrawn if a carrier and its customer agree; no new tariffs would be filed during that time. In the case of existing arrangements, the carrier and its customers could re-examine their contracts and negotiate whatever modifications would be appropriate in light of the withdrawal of the carrier's tariff.[23] Mandatory de-tariffing would apply at the expiration of that phase-out period. The Commission's role in the transition from a tariffed to a de-tariffed environment should be to preclude carriers from using the process to frustrate legitimate customer expectations.

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23 This proposal is consistent with the Commission's thinking at the time it attempted to de-tariff interexchange services on a mandatory basis a decade ago. *See Competitive Carrier*, Sixth Report and Order, 99 FCC 2d 1020, 1033-34 (1985). *See also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1480 (1994) (90-day phase-out for withdrawal of tariffs for commercial mobile radio services).

CONCLUSION

For the foregoing reasons, the Commission should adopt its proposal for mandatory de-tariffing, at least in the case of customer-specific tariffs; permit inclusion of international services and CPE in such de-tariffed offerings; and adopt rules that will prevent affected carriers from taking unfair advantage of the transition to a more deregulatory environment.

Respectfully submitted,

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